November 6, 2003

Mitt Romney, Governor
Commonwealth of Massachusetts

Jane Wallis Gumble, Director
Department of Housing and Community Development

Dear Governor Romney and Director Gumble:

We are pleased to submit the following report on procedural and administrative reforms to reduce the current backlog of housing development proposals now pending before the Massachusetts Housing Appeals Committee. The Housing Appeals Committee Advisory Committee believes that the attached findings and recommendations strike a reasonable balance between the state's critical need for new housing and legitimate local concerns about the impacts of new development. We urge the Department of Housing and Community Development to act on these recommendations and to adopt necessary changes in state regulations and guidelines as soon as practicable.

Thank you for giving us the opportunity to serve on the Advisory Committee and to address these important issues.

Respectfully submitted,

HOUSING APPEALS ADVISORY COMMITTEE

Clark L. Ziegler (Chairman), Executive Director, Massachusetts Housing Partnership

Robert L. Allen, Selectman, Town of Brookline, representing the Massachusetts Municipal Association

Robert Engler, Development Consultant, Stockard, Engler & Brigham

Mark B. Johnson, Attorney, representing the Massachusetts Homebuilders Association

Elaine M. Lucas, Attorney, Brackett & Lucas PC

W. Tod McGrath, Member, Hingham Planning Board & Lecturer, MIT Center for Real Estate Development

William McLaughlin, Vice President, Avalon Bay Communities, Inc.

Edith M. Netter, Attorney and Planning Consultant, Edith M. Netter & Associates, PC

Theodore C. Regnante, Attorney, Regnante, Sterio & Osborne LLP

Robert W. Ritchie, Director, Municipal Law Unit, Office of the Attorney General

Robert M. Ruzzo, Deputy Director, MassHousing

Jason R. Talerman, Attorney, Kopelman and Paige PC

Paul D. Wilson, Attorney, Mintz Levin Cohn Ferris Glovsky and Popeo PC

REPORT OF THE HOUSING APPEALS ADVISORY COMMITTEE

November 2003

EXECUTIVE SUMMARY

The Massachusetts Comprehensive Permit Law (M.G.L. Chapter 40B, §20-23) was enacted in 1969 to create a streamlined local approval process through local zoning boards of appeal for construction of low- or moderate-income housing. The law also allows applicants an opportunity for an expedited administrative appeal to a state Housing Appeals Committee whenever a comprehensive permit is denied or granted with conditions that might render construction of the proposed housing uneconomic.

By any measure, the law has had a significant impact. More than 30,000 housing units in 200 Massachusetts cities and towns have been constructed pursuant to Chapter 40B. Yet throughout its history, Chapter 40B has remained controversial. Furthermore, expanded use of comprehensive permits has created another problem: a significant backlog of cases. Sixty-seven disputed ZBA decisions totaling more than 6,000 potential new housing units are now on hold awaiting hearings and decisions from the Housing Appeals Committee.

An Advisory Committee was formed in August 2003 to advise the Governor and the Director of the Department of Housing and Community Development (DHCD) on steps that might be taken to address this backlog. In this report the Committee recommends several administrative actions that it believes would substantially improve the consideration of housing appeals in Massachusetts:

- Changing the Housing Appeals Committee's staffing and procedures so that cases are heard and decided on a more timely basis.

- Encouraging parties to voluntarily settle housing appeals rather than expend the time and resources needed to complete a Housing Appeals Committee hearing and decision process.

- Recommending policies and regulations for local zoning boards of appeal in order to encourage more decisions to be made locally without the need for appeals to the Housing Appeals Committee.

TABLE OF CONTENTS

I. Background p3

II. History of Chapter 40B and the Housing Appeals Committee p3

III. HAC Process and Capacity p4

IV. Increasing Workload at the Housing Appeals Committee p5

V. Consequences of Delays at the HAC p5

VI. The HAC Advisory Committee p7

VII. Findings and Recommendations

- **A. Housing Appeals Committee Procedures**
- **B. Housing Appeals committee Staffing**
- **C. Mediated Settlement of Housing Appeals**
- **D. Improving Local 40B Process to Minimize Appeals**
- **E. Abutter Appeals**

Appendices

Appendix A: Housing Appeals Committee Procedures Memorandum

Appendix B: Mediation Memorandum

Appendix C: Memorandum Regarding ZBA Review of Project Financial Feasibility

I. BACKGROUND

The Housing Appeals Committee (HAC) hears appeals from applicants who were denied a comprehensive permit by a local zoning board of appeals (ZBA) or who were granted a permit on terms that the applicant contends will make construction of the proposed housing "uneconomic". Currently more than sixty appeals are pending before HAC. While a significant number of appeals are settled or withdrawn, only about 7 to 12 decisions are issued by HAC per year.

The Housing Appeals Advisory Committee was created in response to a recommendation from the May 30, 2003 Chapter 40B Task Force Report to Governor Romney. The HAC Advisory Committee is charged with evaluating the current hearing procedures and suggesting regulatory, procedural and capacity-based improvements.[1]

II. HISTORY OF CHAPTER 40B AND THE HOUSING APPEALS COMMITTEE

Chapter 40B (also known as the comprehensive permit law) was enacted in 1969 to address local regulatory barriers to the construction of low- and moderate-income housing. Since its inception, Chapter 40B has allowed the construction of 30,000 units of housing in 200 communities, two-thirds of which are restricted to serve low- or moderate-income households.[2]

Chapter 40B allows qualified developers (public agencies, nonprofits, or limited-dividend organizations) to apply to a local zoning board of appeals for a single "comprehensive" permit to build housing pursuant to an approved federal or state affordable housing program. The comprehensive permit encompasses local zoning and all other local regulatory approvals; it does not encompass state regulations administered by local boards, such as the state Wetlands Protection Act or Title V septic system regulations.

If more than ten percent of a city or town's housing stock consists of low- or moderate-income housing (or if such housing is located on more than 1-1/2 percent of the community's developable land area) then the ZBA's decision to either grant or deny an application is not subject to appellate review by the Housing Appeals Committee. If less than ten percent of a city or town's housing stock consists of low- and moderate-income housing (or if such housing is located on less than 1-1/2 percent of the community's developable land area), then the applicant may appeal the ZBA's denial or conditional approval of a comprehensive permit to the state Housing Appeals Committee. In the case of a local denial, the ZBA has the burden on appeal of proving that "there is a valid health, safety, environmental, design, open space, planning or other local concern that supports the denial" of the comprehensive permit.[3] In the event of a conditional local approval, the applicant has the burden on appeal of showing that the conditions "make the building or operation of [the proposed] housing uneconomic." Two-thirds of the housing developed with

[1] Chapter 40 B Task Force Report- p 33
[2] Bonnie Heudorfer "The Record on 40B: The Effectiveness of the Massachusetts Affordable Housing Zoning Law," Citizens Housing and Planning Association (CHAPA). June 2003- p10
[3] DHCD Guidelines for Local Review of Comprehensive Permits- p19

comprehensive permits since 1969 has been approved at the local level; only a third was built as a result of appeals to the HAC.[4]

III. HAC PROCESS AND CAPACITY

A developer wishing to appeal a ZBA's decision on a comprehensive permit must file an appeal with the HAC within twenty days after the receipt of the ZBA's written decision.[5] The Housing Appeals Committee must then commence the hearing process (typically by convening a "conference of counsel") within twenty days of receipt of the appeal. The HAC conducts a de novo hearing with stenographic transcripts, sworn testimony, cross-examination and other trial-like procedures that are considerably more formal than most local comprehensive permit hearings.

It has become general practice for the first hearing to be held in conjunction with a site visit in the community where the proposed development is located. Conferences of counsel and all subsequent hearings are typically held in Boston. It is also general practice for hearings to be scheduled weeks apart, rather than on consecutive hearing dates. The HAC encourages voluntary negotiation and mediation between parties outside of the HAC hearings.

The Housing Appeals Committee is a five-member board appointed by the Governor and by the Director of DHCD. Historically the Chairman has been a full-time employee who serves as the Committee's sole hearing officer and sole drafter of decisions; the other four are unpaid committee members. The committee currently meets approximately four times each year (and is available to meet more often if needed) to discuss policies and procedures and to deliberate and render decisions on pending appeals. Historically, the HAC has also been staffed by a full-time counsel and full-time clerk, though the clerk's position has recently become vacant.

[4] Bonnie Heudorfer "The Record on 40B: The Effectiveness of the Massachusetts Affordable Housing Zoning Law," Citizens Housing and Planning Association (CHAPA). June 2003- p38

[5] Abutters and others aggrieved by the issuance of a comprehensive permit may appeal to the Superior Court within the same twenty-day period. .

IV. INCREASING WORKLOAD AT THE HOUSING APPEALS COMMITTEE

Several factors have combined over the last decade to significantly increase the backlog of cases before HAC. First, demand for housing in Massachusetts (and affordable housing in particular) is at all-time high. Second, there is a scarcity of zoned, buildable land – particularly for multifamily housing -- in areas where housing demand is greatest. Third, many more cities and towns are concerned about managing growth and preserving open space and therefore apply a heightened level of scrutiny to Chapter 40B applications. This results in permit conditions that are more complex than in the past and more likely to be appealed.

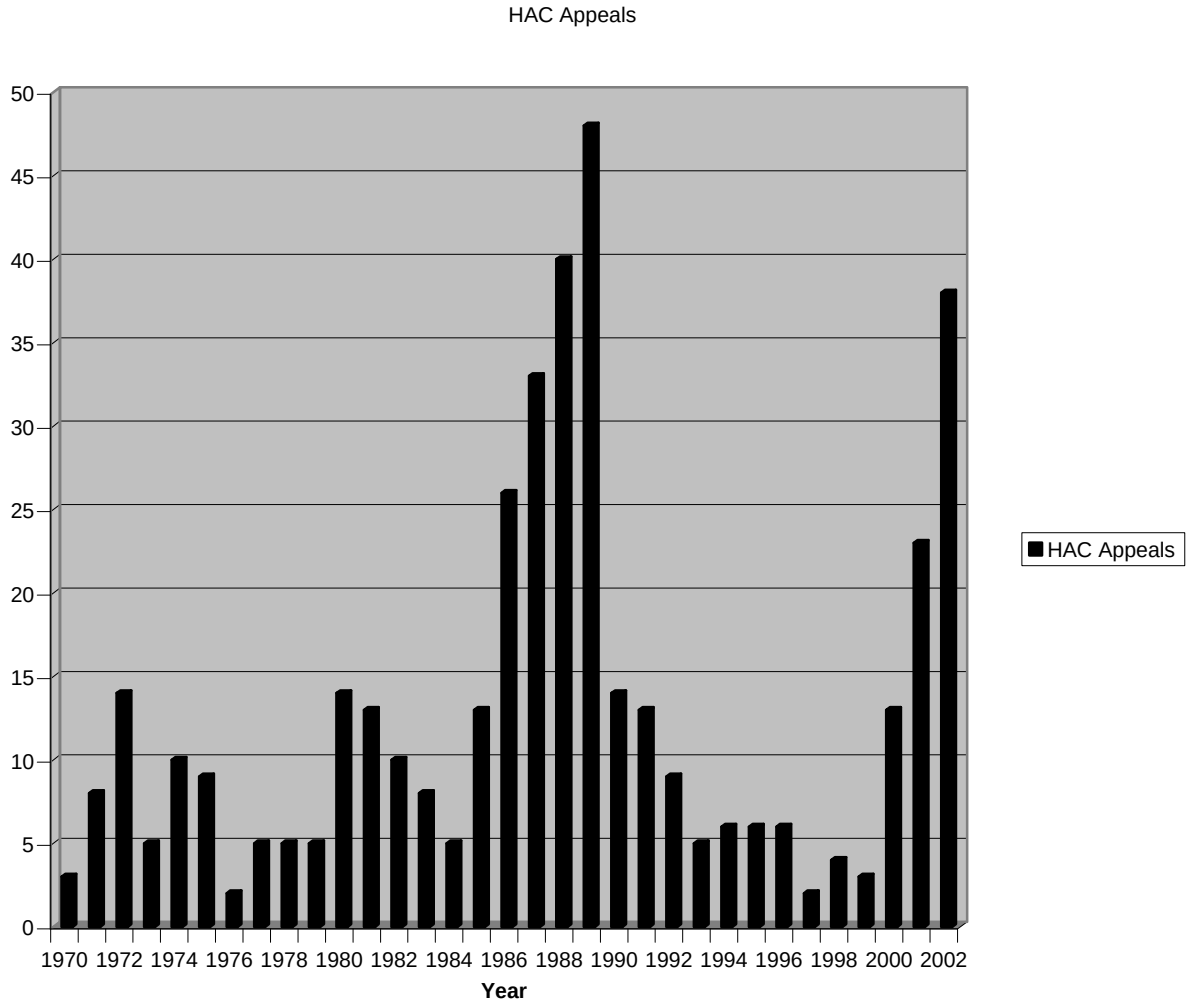
As of October 28, 2003 the HAC had 67 cases pending on its docket. Twenty-four of these cases are considered "active": 20 have hearings underway and four have completed hearings and are awaiting decision. The remaining cases are either in negotiation, have been remanded to the ZBA, or are being held on the docket pending the outcome of judicial appeals. In recent years new appeals to HAC have significantly exceeded the number of cases resolved from previous years. During calendar year 2002, for example, 38 new appeals were received by HAC while full decisions were rendered in seven cases and nine cases were resolved and removed from the docket. (See the following chart for details of the changes in HAC caseload since 1970.) As a result of the backlog and limited staff capacity, it now takes 2 or 3 months to get a hearing at HAC instead of the historic 2 or 3 week wait.

In the event of an appeal, it can take several years from the time a development is proposed to the local zoning board of appeals to the time construction is authorized to begin. In one recent example, a rental development was proposed in a suburban Boston community in the fall of 2000 and spent a year under consideration before the board of appeals before the permit was denied. The developer appealed the local decision and another year-and-a-half was spent pursuing an appeal before the Housing Appeals Committee. The Housing Appeals Committee granted a comprehensive permit and that decision, in turn, was appealed by the ZBA to the Superior Court where it now awaits a hearing. After three years of effort, and considerable expense for *both* the developer and the community, no final resolution is yet in sight.

V. CONSEQUENCES OF DELAYS AT HAC

The consequences of the current backlog at the Housing Appeals Committee are significant. Massachusetts now has the highest housing costs in the U.S. and our rate of per capita housing construction is among the lowest. This supply crisis is exacerbated every time a worthwhile housing development is caught in the backlog at HAC. At best these projects are delayed and incur additional costs; at worst, they are withdrawn and opportunities to develop affordable housing are lost.

HAC Caseload Over Time[6]



Cities and towns are also disadvantaged by the delays built into the current housing appeals process. Many communities would prefer to settle cases locally rather than incur the time and expense of full hearings before the Housing Appeals Committee. Moreover, when applicants are assured of timely local permit decisions it reduces their financial risks and carrying costs and gives them more ability to tailor their projects to address local concerns.

[6] Bonnie Heudorfer "The Record on 40B: The Effectiveness of the Massachusetts Affordable Housing Zoning Law," Citizens Housing and Planning Association (CHAPA). June 2003

VI. THE HAC ADVISORY COMMITTEE

When Governor Romney took office in January 2003 approximately seventy bills to amend Chapter 40B had been filed with the Legislature. To address these proposals, the Governor appointed a 24-member Task Force in consultation with the House and Senate leadership to evaluate Chapter 40B and its impacts and make recommendations to improve the law and its implementation. The Chapter 40B Task Force released its findings and recommendations on May 20, 2003. Among the Task Force recommendations was the formation of a separate Advisory Committee to make recommendations by November 1, 2003 on appropriate steps to address the Housing Appeals Committee's case backlog.

Noting that the backlog at the HAC may be "partially attributable to its hearing procedures, and staffing and capacity constraints", the Chapter 40B Task Force charged the HAC Advisory Committee with "evaluat[ing] the current Housing Appeals Committee hearing procedures (and model guidelines) and suggest[ing] regulatory changes to be promulgated by the Director [of the Department of Housing and Community Development] to improve and expedite those procedures. In addition, the committee will consider whether abutter appeals should be adjudicated by the Housing Appeals Committee."[7]

DHCD Director Jane Gumble appointed the Housing Appeals Advisory Committee in August 2003. The committee was chaired by Clark Ziegler, Executive Director of the Massachusetts Housing Partnership, and consisted of 13 members including municipal and developers' attorneys, local board members, housing developers, and state housing finance officials.

The Housing Appeals Advisory Committee held six formal meetings between August 26, 2003 and October 30, 2003. The committee focused on three areas: Housing Appeals Committee Procedures, Mediation, and Improvements to the Local 40B Processes. Separate information meetings were also held with Judge Mark L. Silverstein, chief Administrative Law Judge for the state Department of Environmental Protection, Chief Justice Karyn F. Scheier of the Massachusetts Land Court, and with Brad Honoroff and David Matz of The Mediation Group.

[7] Chapter 40 B Task Force Report- p33

VII. FINDINGS AND RECOMMENDATIONS

The Housing Appeals Committee Advisory Committee has found the following concerns contribute to the backlog at the HAC and recommends the following changes be made regarding HAC procedures and staffing, mediation settlement and local 40B processes:

A. HOUSING APPEALS COMMITTEE PROCEDURES

Findings:

- Substantially more could be done to reduce the scope of legal and factual matters at issue during the course of HAC appeals.

- Reliance solely on direct testimony in the absence of discovery or pre-filing requirements is inefficient and may result in unnecessary surprises that delay resolution of cases.

- Cases sometimes proceed to full hearings when the issues are relatively straightforward and particular issues could be resolved on a summary basis.

- Alternating hearings dates weeks or months apart creates a lack of continuity in the hearing process and requires the parties and hearing officer to repeatedly refamiliarize themselves with the facts of the case.

Recommendations:

(1) Strengthen pre-hearing orders by (a) formalizing the hearing officer's authority to require submission of a joint prehearing memorandum, and (b) expanding the list of issues that may be addressed in prehearing conference orders.

(2) Require pre-filed direct testimony of all witnesses unless otherwise ordered so that facts and expert opinions are set forth at the beginning of the hearing process and surprises during the hearing process are minimized. Direct testimony and exhibits shall be submitted first by the appellant followed by direct testimony submitted by the appellee and final rebuttal by the appellant under time constraints imposed by the hearing officer. Witnesses must continue to be available for cross-examination at a formal hearing and the hearing officer may exclude any testimony offered at the hearing if it was not included in the pre-filed direct testimony and was reasonably available to be pre-filed.

(3) Encourage summary disposition of cases and/or issues wherever appropriate by (a) formalizing a motions practice prior to the commencement of hearings, including a revised process for submittal of motions, objections to motions and summary rulings on motions and (b) establishing detailed criteria for summary decisions and summary dismissals.

(4) Authorize the hearing officer to enter orders as he/she deems appropriate to enforce pre-hearing orders and other HAC procedures.

(5) Hold hearings on consecutive days to shorten the duration of cases before the Housing Appeals Committee.

(6) Authorize HAC to establish uniform time periods for prehearing submissions and conferences and for the conduct of hearings with the ability to modify those time periods as the circumstances of individual cases may warrant. DHCD should also establish performance benchmarks for the timely consideration of cases by the Housing Appeals Committee after the procedural reforms recommended by this Advisory Committee have been implemented.

B. HOUSING APPEALS COMMITTEE STAFFING

Findings:

- The Housing Appeals Committee does not now have sufficient staffing to conduct appeals and render decisions on a timely basis.

- Given current fiscal constraints it is unreasonable to expect state budget increases to support additional staffing at HAC.

- Settlement discussions during the pre-hearing process may be more effective if managed by a different hearing officer than the hearing officer who would subsequently be conducting the hearing and drafting the decision.

- Formal meetings of the Housing Appeals Committee and issuance of decisions are too infrequent given the current backlog of cases before HAC.

Recommendations:

(1) Add a second hearing officer at the Housing Appeals Committee which would result in a four-personal staff: Chairman/hearing officer, second hearing officer, counsel and clerk. The hearing officers would conduct conferences of counsel, hear pre-hearing motions, conduct hearings and draft decisions on behalf of the Housing Appeals Committee. The incremental costs of the new position should be borne in whole or in substantial part by increased filing fees and/or site approval application fees.

(2) Consider incorporating the second hearing officer as a member of the Housing Appeals Committee and also consider classifying the hearing officer positions in a manner that creates a professional career track and clearly identifies their role as full-time adjudicators.

(3) Convene the Housing Appeals Committee monthly or as needed to render prompt decisions.

C. MEDIATED SETTLEMENT OF HOUSING APPEALS

Finding:

- Many more cases before the Housing Appeals Committee might be voluntarily mediated if there was a readily available off-the-shelf mediation program with its own funding mechanism.

Recommendations:

(1) Routinely offer mediation of HAC appeals through the Massachusetts Office of Dispute Resolution (MODR), with coordination provided by Housing Appeals Committee or DHCD staff and outreach made through professional organizations and through publications such as Lawyer's Weekly.

(2) Build voluntary mediation sessions into the HAC calendar so that parties may agree to participate in mediation without delaying their hearing dates.

(3) Utilize a second hearing officer to assist parties with settlement during the pre-hearing process and in appropriate circumstances, encourage mediation.

(4) Create a self-supporting mediation fund that would pay up to $4,000 in mediation expense whenever parties agree to mediation. The fund would be supported by site eligibility letter fees and/or Housing Appeals Committee filing fees. Any additional mediation costs would be paid as agreed upon by the parties.

D. IMPROVING LOCAL 40B PROCESS TO MINIMIZE APPEALS

Finding:

- The volume of appeals to HAC might be reduced if cities and towns had better guidance on how to conduct informal working sessions outside of the formal hearing process in a manner consistent with the state Open Meeting Law. In many cases, informal work sessions, during which peer review consultants, the developers' representatives and a single member of interested municipal boards meet outside of the ZBA's public meetings, have shown to be extremely beneficial.

Recommendation:

- Provide clear policy guidance to cities and towns on when and how it is proper to conduct informal working sessions with a 40B applicant in compliance with the Open Meeting Law and without engaging in improper ex parte communications. If possible that guidance to cities and towns should reflect a shared interpretation of relevant state laws by the Attorney General and district attorneys.

In response to a concept paper (which is included in the Appendix to this report) the Advisory Committee also spent several meetings discussing local financial review of 40B proposals. Most cases before the Housing Appeals Committee involve conditional approvals, not denials, and hinge on whether conditions imposed by the local zoning board of appeals render the proposed developments "uneconomic". There is currently no official guidance to ZBAs on how to arrive at reasonable conditions, based on objective project impacts, which are likely to be upheld and therefore reduce the likelihood of appeals.

While this issue went beyond the original scope of the Advisory Committee, and there was insufficient time to reach consensus, the Committee believes that the issue is important and has the potential both to reduce the caseload before HAC and to narrow the range of issues in dispute when local decisions are appealed. We recommend that the Department of Housing and Community Development continue this effort and take steps to publish additional guidance on these matters for zoning boards of appeal.

E. ABUTTER APPEALS

The Advisory Committee was also asked to recommend whether state law should be amended to provide that abutter appeals be adjudicated in the first instance by the Housing Appeals Committee. We were unable to reach agreement on this issue. Proponents of such a change argued that abutter appeals of locally granted comprehensive permits are typically a delaying tactic to keep housing from being built and that the Housing Appeals Committee has the unique legal and technical expertise needed to address these appeals on a timelier basis. Opponents argued that abutters' existing rights to appeal directly to the courts results in the abutters' concerns being taken more seriously at the local level.

There was general agreement that the Housing Appeals Committee could not assume additional responsibilities in any event unless the procedural reforms similar to those recommended by this Advisory Committee have been adopted and the current case backlog is reduced.

APPENDICES

The following working papers are being included in this report to illustrate some of the issues discussed and recommendations made by the Advisory Committee. They were prepared by subgroups of individual committee members and do not necessarily represent the views of the full Advisory Committee. The appendices include:

Appendix A: Housing Appeals Committee Procedures Memorandum

Appendix B: Mediation Memorandum

Appendix C: Memorandum Regarding ZBA Review of Project Financial Feasibility

APPENDIX A: HOUSING APPEALS COMMITTEE PROCEDURES MEMORANDUM

To: HAC Task Force
From: HAC Procedures Working Group (Ted Regnante, Mark Johnson, and Jay Talerman)
Date: October 30, 2003
Re: Possible Changes to HAC Regulations

The following memorandum represents the work of the Housing Appeals Committee Procedures working group. The memorandum consists of an example of how HAC regulations 760 CMR 30.07 can be modified to incorporate the Housing Appeals Committee Procedures and Staffing sections of the recommendations of this report. These draft regulations are meant to serve purely as an example and do not substitute for actual regulations.

I. 760 CMR 30.07 is hereby repealed in its entirety and replaced with the following:

30.07 Motions

1. Presentation, Objection to Motions and Rulings**.** A party may request of the hearing officer any order or action consistent with law and 760 CMR 30.00 et. seq. and 760 CMR 31.00 et. seq. which will assist in resolving issues expeditiously by filing a motion. Motions may be made in writing at any time after filing the initial pleading. A copy of any motion made in writing or reduced in writing at the request of the hearing officer shall be served upon the parties in accordance with 760 CMR 30.08. If a hearing is desired it shall be requested in writing at the time the motion is filed. A hearing may be held at the discretion of the hearing officer. At least ten (10) days notice of any such hearing shall be given by the Committee to the parties, unless such notice is waived. Written objections to motions must be filed seven (7) days after the motion is filed. A failure to file a timely response may result in a grant of the relief requested by the moving party. The hearing officer shall have discretion to rule on any motions at the time it is made or to reserve ruling until a later time.

2. Summary Ruling. The hearing officer may summarily, and without awaiting a response or objection to the motion, act on a motion, with or without prejudice, in appropriate circumstances, which may include:

(a) non-adversarial or routine motions;

(b) motions having the assent of all non-moving parties;

(c) motions the hearing officer determines would consume time without resolving material issues; or

(d) motions the hearing officer determines to be frivolous in view of the established law or facts of the appeal.

3. Motions to Strike. A party may move to strike, or the hearing officer may strike from a pleading any insufficient allegation or defense or any redundant, irrelevant, immaterial, impertinent or scandalous matter; and from any testimony material which is unduly repetitious, irrelevant or otherwise inadmissible.

4. Motions to Dismiss.

(a) General Grounds. A party may move to dismiss where another party fails to file documents as required, respond to notices, correspondence or motions, comply with orders issued and schedules established in orders, otherwise fails to prosecute the case or demonstrates an intention not to proceed; for lack of standing, lack of jurisdiction, mootness or untimeliness.

(b) Motions to Dismiss for Failure to Sustain a Case. Upon the petitioner's submission of prefiled testimony, or at the close of its live direct testimony , any opposing party may move for the dismissal of any or all of the petitioner's claims, on the ground that upon the facts or the law, the petitioner has failed to state its case; or the hearing officer may, on his or her own initiative, order the petitioner to show cause why such a dismissal of claims should not issue.

5. Motions for Summary Decision. Any party may move with or without supporting affidavits for a summary decision in the moving party's favor upon all or any of the issues which are the subject of the appeal. The hearing officer shall not act on any motion for summary decision until at least 14 days after filing. During this time, parties opposed to the motion may file opposing affidavits and briefs. The decision sought shall be made if the pleadings, depositions, if any, pre-filed testimony, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a decision in its favor as a matter of law. A Motion for Summary Decision interlocutory in character may be made on any issue, although there is a genuine controversy as to other material issues. Summary decision, when appropriate, may be made against the moving party.

Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence under CMR 30.10(l), and shall show affirmatively that the affiant is competent to testify to the matters stated in the affidavit.

Sworn or certified copies of all papers or parts of papers referred to in an affidavit shall be attached to or served with the affidavit. The hearing officer may permit affidavits to be supplemented or opposed by further affidavits, provided that motions made pursuant to 760 CMR 30.07(5) shall be granted or denied solely on the basis of evidence admissible under CMR 30.10(l). When a Motion for Summary Decision is made and supported as provided in 760 CMR 30.07(5), a party opposing the motion may not rest upon the mere allegations or denials of said party's pleading, but must respond by affidavits or otherwise, setting forth specific facts showing that there is a genuine issue for hearing on the merits. If a party does not respond, summary decision, if appropriate, shall be entered against the party. Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to

justify opposition to the motion, the hearing officer may deny the Motion for Summary Decision or may order a continuance to permit affidavits to be obtained or may make such other orders as are just.

II. 760 CMR 30.11 is hereby repealed in its entirety and replaced by the following:

30.11 Depositions, Stipulations, Prefiled Testimony and Subpoenas.

(1) Depositions. Motions to take a deposition may be granted by the hearing officer only upon a showing that the parties have agreed to submit the deposition in lieu of testimony or the witness cannot appear before the hearing officer without substantial hardship; and the testimony sought is relevant, not privileged and not discoverable by alternative means. The hearing officer may establish the timing, scope and conduct of the deposition and its use as evidence in the appeal.

(2) Stipulations. In the discretion of the hearing officer, the parties may, by stipulation in writing filed with the Committee at any stage of the proceeding or orally made at the hearing, agree upon pertinent facts in the proceeding. In making its findings, the Committee need not be bound to any such stipulation.

(3) Prefiled Testimony. The hearing officer shall order all parties to file within a reasonable time in advance of the hearing the full written text of the testimony of all of their witnesses on direct examination, including all exhibits to be offered in evidence. The hearing officer shall also require the filing of written rebuttal testimony within time limits imposed by the hearing officer. The burdens of proof during the hearing and order of presentation of evidence are governed by the Committee's regulations set forth in 760 CMR 31.06. As described therein, direct testimony shall be submitted first by the appellant followed by direct testimony submitted by the appellee and final rebuttal by the appellant under time constraints imposed by the hearing officer. The hearing officer may exclude direct testimony offered at the hearing which was not included in the prefiled direct testimony, but was reasonably available at the time such testimony was filed. All prefiled testimony shall be subject to the penalties of perjury. All witnesses whose testimony is prefiled shall appear at the hearing and be available for cross-examination. If a witness is not available for cross-examination at the hearing, the written testimony of the witness shall be excluded from the record unless the parties agree otherwise.

(4) Subpoenas. In conducting appeals, the hearing officer may issue, vacate, modify and enforce subpoenas requiring the attendance and testimony of witnesses and the production of documents or other evidence.

III. 760 CMR 30.09(4) is hereby repealed in its entirety and replaced by the following:

30.09(4) Prehearing Conference, Joint Prehearing Memorandum and Pretrial Conference Order.

(a) The hearing officer may order the parties to appear for a conference prior to the scheduling of a hearing on the merits of the claim to:

(i) discuss settlement

(ii) define contested issues on which evidence will be offered

(iii) consider the possibility of obtaining stipulations, admissions and agreements which will avoid unnecessary evidence;

(iv) establish limits on presentations of the parties;

(v) establish a schedule for continuing the appeal, including a date or dates for the hearing; and

(vi) consider any other matters which may aid in the disposition of the appeal.

(b) Parties shall appear at the prehearing conference with full authority to make binding agreements, including commitments as to scheduling, or shall come to the conference with the name of the person from whom authority is required and be able to communicate directly with the person at the time of the conference.

(c) Joint Prehearing Memorandum.

The hearing officer may require the parties to file a joint prehearing memorandum prior to the conference. The memorandum shall include:

(i) a concise summary of the evidence which will be offered by the parties;

(ii) a list of all agreed facts;

(iii) a list of the contested issues of fact and law;

(iv) the amount of time necessary for each party to conduct its case;

(v) a list of witnesses to be called, including the designation of those who will be offered as expert witnesses, and a brief summary of the testimony of each witness;

(vi) any additional matters likely to facilitate the disposition of the appeal.

If in the opinion of the hearing officer, the parties have not prepared a joint prehearing memorandum which adequately addresses the above requirements, the hearing officer may refuse to schedule a hearing date, and may order the parties to prepare a new joint prehearing memorandum.

Changes to the joint prehearing memorandum may be made only upon leave of the hearing officer, which leave shall be granted upon good cause shown.

(d) Prehearing Conference Order.

At the time of or following the conference the hearing's officer may issue an order in writing including:

(i) a statement of the issues to be tried;

(ii) a list of witnesses who will offer testimony;

(iii) rulings on pending motions;

(iv) a schedule for filing further motions, prefiled testimony and exhibits, rebuttal testimony and scheduling the date or dates of the hearing;

(v) attendance at an alternative dispute resolution session when the hearing's officer determines it could aid in the just and speedy resolution of the appeal; and

(vi) incorporation of any matters agreed to by the parties.

(E) Failure of parties to comply with any rule or order issued by the hearing's officer may result in the imposition of sanctions by the hearing's officer including the imposition of costs.

APPENDIX B: MEDIATION MEMORANDUM

To: HAC Task Force
From: Mediation Working Group (Edie Netter, Elaine Lucas, and Bob Ritchie,)
Date: October 3, 2003
Re: Mediation Working Group – HAC Task Force

The purpose of this memorandum is to summarize the recommendations of Brad Honoroff and David Matz of The Mediation Group (TMG), that of the Mediation Subcommittee and Werner Lohe, Chairman of HAC.

I believe that this memorandum represents the ideas of everyone in attendance at the meeting with TMG (Edie Netter, Elaine Lucas, Bob Ritchie, Courtney Koslow, and Werner Lohe). If this is not the case, please let me know.

HAC currently has approximately 58 cases; 20 of which are active (in the hearing or waiting-for-decision stage). In 2002 HAC rendered 7 decisions and issued some orders, some of which were substantive, others were routine. The Massachusetts Office of Dispute Resolution (MODR) presently administers a HAC mediation panel; however, because of budget cuts it now has only three people on staff. At the present time we do not know how many cases settle (with or without the assistance of a mediator).

The premise under which the Subcommittee was operating was that the availability of a well-advertised mediation program would lead to a reduction in the HAC caseload. Mediation often results cases being settled or a decrease in the number of issues to be litigated. Local governments save money, developers save time and garner good will. All parties retain control of the outcome.

1. Mediation is the appropriate form of alternative dispute resolution. Lawyers (and clients) are not as familiar with other forms of alternative dispute resolution; even if they are, mediation is the form most frequently used and would be most suited to 40B disputes.

2. HAC should provide the parties with an option for mediation prior to a hearing without altering the date of the hearing. HAC should establish a calendar providing for a mediation date within a few weeks and a hearing date further in the future. Parties can opt for mediation and never have to resort to a HAC hearing. Mediation would not slow the process down nor alter otherwise applicable mileposts (unless the parties so choose).

3. MODR should continue to administer the panel of mediators. Consideration should be given to providing Department of Housing and Community Development staff support to manage the HAC mediation program in conjunction with MODR. The process needs to be administered with sensitivity. For example, the choice of the mediator will affect the type of alternative dispute resolution process used. HAC expects that the State will provide $1000. to MODR for each mediation administered. Apart from MODR's excellent track

record, it has the benefit of being in place and ready to go, needing only administration, funding, and a mission. Thus, working with MODR should yield earlier outcomes.

4. More visibility should be given to the HAC mediation program. This could be accomplished by requesting that various organizations inform their members about the program, and articles in various magazines, newsletters and Lawyers Weekly.

5. There should be incentives given to parties who agree to mediate that justify any cost in money or time. One suggestion would have the applicant – typically the party with greater cash reserves -- provide all or most of the costs of mediation in return for which there would be a dollar-for-dollar addition to the applicant's otherwise calculated reasonable return on investment. Thus, a short term outlay would be rewarded by a long term recapture.

6. Towns should pay little, if any, of the mediation fees. Either developers should pay the entire (or most of) the fee (including the town's share) or MHP should consider giving towns a grant for a town's share of the fees.

APPENDIX C: MEMORANDUM REGARDING ZBA REVIEW OF PROJECT FINANCIAL FEASIBILITY

To: HAC Task Force
From: Robert Engler, W. Tod McGrath
Date: October 30, 2003
Re: Guidelines For ZBA's to Determine Whether a Project is Financially Feasible or "Uneconomic"

The following consists of an example of how the Model Local Rules HAC can be modified to incorporate the recommendations of this report.

PROPOSED GUIDELINES FOR ZBA'S TO DETERMINE WHETHER A PROJECT IS FINANCIALLY FEASIBLE OR "UNECONOMIC"

Under Chapter 40B case law, a limited dividend developer has been defined as a developer who is willing to enter into a Regulatory Agreement with the subsidizing entity, which limits the developer's "profit". In the case of for-sale housing, profit has generally been defined as the amount of net cash available to the developer (once all of the units have been sold) in excess of the total development costs. In the case of rental housing, profit has generally been defined as the annual amount of distributable cash flow from operations of the property. However, the definition of "profit" has not been clearly or consistently defined in all affordable housing programs in terms of both the method of calculation and the specific threshold levels below which a project would be viewed as "uneconomic". The guidelines suggested herein are designed to address those deficiencies.

More specifically, developer profit is defined by a much tighter and clearer front end specification of the methodology for calculation, including definitions and industry standards or acceptable ranges for certain line item costs. With a more comprehensive and understandable methodology for review of a project's pro forma financial feasibility available to the ZBA, the need to require any "look-back" provisions to further regulate profit upon completion of the development is unnecessary (unless the project changes subsequent to the approval of the comprehensive permit and requires additional ZBA review.)

FOR-SALE (SINGLE FAMILY or CONDOMINIUM) DEVELOPMENTS

The preliminary pro forma submitted as part of the site approval application (and re-submitted as part of a comprehensive permit application) should reflect a profit margin in the range of 15-20%, based on the methodology described below. The final approved development should project a profit margin to the developer of not less than 15% in order for the project to be deemed not "uneconomic".

Developer profit shall be defined as the projected net cash available to the developer in excess of all projected development costs. The following guidelines help to define such projected development costs and revenues and are intended to be applicable to all affordable housing programs used in connection with for-sale housing developed under Chapter 40B:

Land Value / Acquisition Costs:

Land cost shall equal the as-is fair market value[1] of the site under its current zoning[2] at the time of submission of the request for a Determination of Project Eligibility, if such site is already owned by the Applicant or a related entity. If the site is to be acquired by the Applicant in an arms-length transaction, land cost shall equal the as-is fair market value ascribed above plus a premium of up to of 25%[3] to enable the affordable housing developer to be competitive in the private land market and offer the seller a price that reasonably approximates the expected carrying costs and increases in the market value of the site during the hearing process.

Developer Overhead:

Developer overhead reflects the expenses of administering the project during the planning, construction and sales phases, and shall be limited to 3% of total project costs, exclusive of land acquisition costs. Developer overhead is a necessary project expense and is not to be considered as a component of developer profit.

Hard Cost Contingency:

A contingency factor applied to the estimate of hard construction costs[4] shall not exceed 5%.

Soft Cost Contingency:

A contingency factor applied to all projected soft costs, excluding real estate commissions on the sale of the units and the contingency itself, shall not exceed 10%.

Construction Management:

Construction management costs shall be included only if the developer and the contractor entities are totally unrelated; in such case, the construction manager is a salaried person hired as the "agent" of the developer to oversee the work of the general contractor and that annual salary (based on industry standards) shall be applied to the length of time for the construction period.

If the developer is also the contractor (or it is a related party) and the developer is acting as a construction manager for the project (i.e., hiring all the sub-contractors, carrying the necessary

[1] Determined by appraisal from an independent appraisal company approved by DHCD.
[2] Not reflecting the value associated with the issuance of a comprehensive permit.
[3] The applicable premium will be the lesser of (x) 25% of the as-is fair market value of the site and (y) the contractual site acquisition cost in excess of such as-is fair market value.
[4] Hard construction costs include estimated site development costs but exclude land acquisition costs.

insurance and the cost of general conditions, etc.), this fee shall be included as part of the contractor's overhead and profit margin and shown in the hard cost estimate.

Commissions – Market Units:

Commissions on the sales of the market units, whether or not the brokerage is handled by the developer, a related party or a third party, shall not exceed 5%.

Marketing - Affordable Units:

Marketing costs for administering the lottery and affirmative fair housing marketing processes shall not exceed 2% of the total sales of the affordable units.

Site Development Costs:

These costs are site specific and estimates tend to be more preliminary than other cost categories. Such costs should be broken out, if applicable, with estimates for the following categories:

Roads (including utilities in the roads)
On-site Septic system
On-site water system
Blasting allowance
Rough grading/site preparation
Landscaping
Utility connections

Unit Construction Costs:

Hard construction costs applicable to the units, project amenities, and common areas shall be supported by a certified cost estimate, if requested by the board of appeals, since square foot costs vary widely by the type of construction, the size of the project, and the fluctuations in the cost of certain materials over time.

Project Revenues - Affordable Units:

Projected sales prices shall be based on the following methodology:

The average target sales price of the affordable units shall be established such that one-third of the affordable units will be affordable to families at 60%, 70%, and 80%, respectively, of area median income assuming the following:

1 BR unit = 1.5 person household
2 BR unit = 3 person household
3 BR unit = 4 person household
4 BR unit = 5 person household

30% of gross household income = total annual housing costs, divided by 12 months = total monthly housing cost

deduct estimated real estate taxes, property insurance, condo fees, and, if applicable, PMI

remainder = available to service mortgage

divide by applicable mortgage loan constant based on current mortgage interest rates (within program being utilized) and a 30-year amortization schedule

the quotient is the maximum supportable mortgage

divide by .95 to arrive at target sales price (which allows for a maximum 5% down payment)

Project Revenues - Market Units:

Estimated sale prices by unit type shall be supported by a market study which identifies recent sales prices of comparable units provided from an MLS listing or alternative.

General:

The pro forma presentation of projected development costs, sales revenues, and developer profit shall follow the format used by Mass Housing in its site approval application form, but additional line items can be added, if necesssary, such as

marketing – affordable units
development consultant
development overhead

Peer review consultants can be retained by the ZBA, at the applicant's expense, to assist the ZBA if it or other local boards have no professional staff capable of handling the review in the following areas:

Civil and environmental engineering
Architectural design/site planning
Cost estimating/financial feasibility
Appraisal/market studies

The methodology for settling disputes over estimated values in the areas of land cost, construction costs, and market unit sales prices shall be as follows: if the peer review consultants (appraisers, cost estimators, engineers, etc.) disagree by more than 10%, then a third opinion shall be sought from a mutually agreeable and qualified third party and that third party shall select one

of the two opinions that is closest to his/her evaluation, and that opinion shall be used by the ZBA in making its determination

If the developer's consultants and the ZBA's peer review consultants are within 10% of each other, the estimate used shall be the mid-point between the two.

RENTAL DEVELOPMENTS

Developers of mixed-income rental projects should receive a minimum expected investment return (profit) equal to the average yield[8] on 10-year U.S. Treasury securities throughout the hearing process plus a risk premium of X% in order to compensate them for the risks associated with developing and operating such properties. Expected investment returns applicable to such rental projects will be calculated using the same methodology that is used to calculate expected investment returns for 10-year U.S. Treasury securities, commercial and home mortgage loans, and other commercial real estate investments.

Developers of rental projects would qualify as limited dividend organizations by agreeing to the permit conditions imposed by the ZBA (or HAC or other adjudicatory body, if appealed) and executing an appropriate Regulatory Agreement. Once the comprehensive permit is issued, there shall be no subsequent annual reviews of the limited dividend, only annual reviews to determine if the project is in compliance with the other provisions of the Regulatory Agreement.

The following guidelines help to define projected development costs, revenues, and investment returns and are intended to be applicable to all affordable housing programs used in connection with rental housing developed under Chapter 40B:

Investment Return Methodology:

The methodology for determining the expected investment return for proposed multi-family rental developments is as follows:

- Forecast the amount and timing of each of the expected future cash outflows and inflows[9] associated with pursuing the development. More specifically, identify the total dollar amount and timing of the actual expenditures that must be incurred by the developer in order to get the project permitted and constructed[10], and then identify the expected annual amount of net operating income (NOI) to be generated by the property as well as the expected amount of net sale proceeds available to the developer when the property is sold at the end of the projected investment term.

[8] The average of (x) the yield applicable as of the close of trading on the date of submission of the application to the ZBA and (y) the yield applicable 30 days prior to the issuance, in writing, of the comprehensive permit by the ZBA.
[9] On an unlevered basis, i.e., assuming all equity (no permanent debt) in the capital structure.
[10] Including the estimated cost of all permit conditions imposed by the ZBA.

- Perform the calculation[11] of the development's projected Internal Rate of Return (IRR) based on all of the expected future cash outflows and inflows identified above.

If the development's projected IRR is greater than the applicable minimum expected rate of investment return, then the proposed development is financially feasible; if the development's projected IRR is below the applicable minimum expected rate of investment return, then the proposed development is financially infeasible ("uneconomic").

In connection with the methodology described above, estimated development costs shall include (but not be limited to) the following:

Land Value / Acquisition Costs:

Land cost shall equal the as-is fair market value[12] of the site under its current zoning[13] at the time of submission of the request for a Determination of Project Eligibility, if such site is already owned by the Applicant or a related entity. If the site is to be acquired by the Applicant in an arms-length transaction, land cost will equal the as-is fair market value described above plus a premium of up to of 25%[14] to enable the affordable housing developer to be competitive in the private land market and offer the seller a price that reasonably approximates the carrying costs and increases in the market value of the site during the hearing process.

Hard Costs – Unit Construction:

Hard construction costs shall be presented both as line item and square foot construction costs, including contractor overhead and profit, general conditions, and payment & performance bond (or alternative); if requested by the borad of appeals, these costs shall be supported by a certified cost estimate.

Developer Overhead and Fee:

8% of all other estimated development costs excluding land acquisition cost Such developer overhead and fee are necessary project expenses and are not to be considered as a component of developer profit.

---

[11] The formula for calculating the Internal Rate of Return on any investment is:

$$\$0 = CF_0 + \frac{CF_1}{(1+IRR)^1} + \frac{CF_2}{(1+IRR)^2} + \cdots + \frac{CF_t}{(1+IRR)^t}$$

where: CF_0 represents the initial cash outflow, and
CF_1 through CF_t represent (typically annual) cash outflows or inflows occurring throughout the entire length of the investment holding period, represented by t.

[12] Determined by appraisal from an independent appraisal company approved by DHCD.

[13] Not reflecting the value associated with the issuance of a comprehensive permit.

[14] The applicable premium will be the lesser of (x) 25% of the as-is fair market value of the site and (y) the contractual site acquisition cost in excess of such as-is fair market value.

Project Revenues - Market Units

Estimates of annual rental revenue for market-rate units will be supported by a recently completed market study of comparable developments within the market area of the proposed development. Such market study will be prepared by a qualified market analyst or appraiser.

Project Revenues - Affordable Units:

Estimates of annual rental revenue shall be based on the following methodology:

The monthly rental rates for the affordable units shall be established such that one-third of the affordable units will be affordable to families at 60%, 70%, and 80%, respectively, of area median income, assuming the following:

1 BR unit = 1.5 person household
2 BR unit = 3 person household
3 BR unit = 4 person household
4 BR unit = 5 person household

Annual Operating Costs:

Estimates of annual operating costs will be supported by data from projects of similar size and type, preferably from a recognized lender on market-rate and/or mixed-income housing developments.

Vacancy / Bad Debt Allowances & Annual Trending Assumptions:

These assumptions shall conform to the underwriting guidelines of the affordable housing program being used. If requested by the board of appeals, questions relating to such underwriting guidelines or assumptions will be responded to in writing by the subsidizing agency.

Finance Fees, Credit Enhancement Fees, Lender Fees & Operating Reserves

Estimates of these costs shall conform to the underwriting guidelines of the affordable housing program being used.

Construction Loan Interest Rate, Term and Loan-to-Value (or Cost) Ratio

These costs shall conform to the underwriting guidelines of the affordable housing program being used.

General:

The pro forma should be discussed at the public hearings after all other issues relating to the physical characteristics of the site and the proposed development (including concerns of heath and safety, environmental management, possible mitigation of project impacts, access and egress, internal circulation, etc.) have been discussed. In that way, any suggested or proposed modifications to the project which have been generated from these discussions can be viewed in light of their financial implications based on appropriate adjustments to the initial pro forma. The pro forma should be used as a vehicle to determine that the project remains financially feasible with whatever modifications are being sought by the ZBA.

Peer review consultants can be retained by the ZBA, at the applicant's expense, to assist the ZBA if it or other local boards have no professional staff capable of handling the review in the following areas:

Civil and environmental engineering
Architectural design/site planning
Cost estimating/financial feasibility
Appraisal/market studies

The methodology for settling disputes over estimated values in the areas of land cost, construction costs, and market unit rental rates shall be as follows: if the peer review consultants (appraisers, cost estimators, engineers, etc.) disagree by more than 10%, then a third opinion shall be sought from a mutually agreeable and qualified third party and that third party shall select one of the two opinions that is closest to his/her evaluation, and that opinion shall be used by the ZBA in making its determination

If the developer's consultants and the ZBA's peer review consultants are within 10% of each other, the estimate used shall be the mid-point between the two.